Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Petition for Declaratory Ruling to the Iowa Utilities Board and Contingent Petition for Preemption	WC Docket No. 09-152

GREAT LAKES COMMUNICATION CORP. AND SUPERIOR TELEPHONE COOPERATIVE

REPLY COMMENTS IN SUPPORT OF PETITION FOR DECLARATORY RULING TO THE IOWA UTILITIES BOARD AND CONTINGENT PETITION FOR PREEMPTION

Ross A. Buntrock
Stephanie A. Joyce
Michael W. Fleming
Arent Fox LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036

Counsel to
Great Lakes Communication Corp. and
Superior Telephone Cooperative

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Great Lakes Communication Corp. and Superior Telephone Cooperative (collectively, the "Petitioners"), by their undersigned counsel and pursuant to the Public Notice in this docket,[1] hereby submit these Reply Comments in support of their Petition for Declaratory Ruling and Contingent Petition for Preemption ("Petition").

INTRODUCTION AND SUMMARY

With the Iowa Utilities Board ("Board" or "IUB") having released the Final Order[2] on September 21, 2009, the day on which Initial Comments were due in this docket, any protests by the interexchange carriers ("IXCs") that the Petition is not ripe are put to rest. Though, as Petitioners demonstrated in their Opposition to Motion of Qwest Communications Company, LLC to Suspend Comment Schedule filed September 16, 2009 ("Opp."), Qwest had already submitted the "unofficial transcript" ("Tr.") of the Board's Decision Meeting in two federal courts.[3] That transcript displayed that, in fact, the Board had reached final decisions on August 14, 2009, on every issue in the Qwest Complaint. Indeed the Final Order contains the same findings, conclusions, and ordering clauses that the Board announced, with only one limited exception.[4] As the Petition explained, many of those findings, conclusions, and ordering clauses are well outside the bounds of the Board's intrastate jurisdiction. Other items stand in

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1 WC Docket No. 09-152, *Comments Sought on Petition for Declaratory Ruling and Contingent Petition for Preemption of Great Lakes Communications Corp. and Superior Telephone Cooperative*, DA 09-1843 (Aug. 20, 2009).

2 Docket FCU 07-2, *Qwest Communications Corp. v. Superior Tel. Coop., et al.* (Iowa Utils. Bd. Feb. 20, 2007).

3 Petitioners were surprised that the United States Telecom Association questioned the reliability of the transcript in its comments. Comments of USTA at 1 n.2. As Petitioners explained on September 16, Qwest — a member of USTA — submitted that transcript to federal courts as authority in favor of its claims and defenses, and under Fed. R. Civ. P. 11 must be presumed to have done so in good faith.

4 The Board did not memorialize in the Final Order its public announcement on August 14, 2009, that Great Lakes does not qualify for the Commission's rural exemption under the access rules. Petitioners' Opposition to Motion of Qwest Communications Company, LLC to Suspend Comment Schedule at 3 (Sept. 16, 2009) (quoting Tr. at 6). The Final Order did, however, "refer the issue to the FCC" as it had promised to do on August 14. Tr. at 6; Final Order at 69.

direct contravention of federal law, such as the Commission's *Farmers and Merchants Order*,[5] or create a scenario in which compliance with both federal law and the Final Order is impossible. These Reply Comments will explore those items exactly as they are now expressed in the Final Order and explain why the Commission should preempt each of them under federal law, including *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986).[6] Petitioners present these items *verbatim* from the Final Order, and thus the Commission immediately will see that nearly all of them are silent as to whether they apply to intrastate traffic, interstate traffic, or both. Petitioners thus are forced to seek the Commission's intervention in order to prevent any IXC from seeking to enforce the Final Order on matters of interstate communications in any forum.

From the outset, Petitioners must address a common refrain in the opposition's comments: that the Board "'is aware of its jurisdictional limitations with respect to interstate and international traffic[.]'"[7] Petitioners heard this same refrain when they moved to exclude evidence on interstate traffic, terminated minutes, and access revenue.[8] In this matter, however, words are not enough. The Board may have been "aware of its jurisdictional limitations," but as demonstrated herein it did not abide by them.

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[5] *Qwest Communs. Corp. v. Farmers and Merchants Mut. Tel. Co.*, File No. EB-07-MD-001, Memorandum Opinion and Order, FCC 07-175, 22 FCC Rcd. 17973 (2007). The Commission granted Qwest's request, styled as a "Petition for Reconsideration," to obtain and submit additional post-decision discovery regarding Farmers' retail invoices. 23 FCC Rcd. 1615 (2009).

[6] Sprint argues that *Louisiana PSC* "is of no help to Petitioners" simply because, in that case, preemption was deemed inappropriate. Opposition of Sprint Communications Company LP at 7. This facile attempt to discredit *Louisiana PSC* is unavailing, for the fact remains that the Supreme Court's opinion in *Louisiana PSC* remains the preeminent case outlining the test for determining whether preemption is appropriate. *E.g.*, *City of New York v. FCC*, 486 U.S. at 63-64 (citing and quoting *Louisiana PSC*, 476 U.S. at 368-69).

[7] AT&T's Opposition to Petition for Declaratory Ruling at 2 (quoting Final Order at 77); *see also* Initial Comments of the Iowa Office of Consumer Advocate at 3; Comments of the Iowa Utilities Board at 4.

[8] As Petitioners noted in their Opposition, they filed a Motion to Exclude Evidence in the Iowa case on November 11, 2008, requesting that the Board exclude evidence regarding, among other things, interstate and international calls. The Board denied that motion *in toto* on November 26, 2008, stating that "QCC's initial complaint is sufficiently broad to relate to the categories of evidence raised by the Respondents." Docket FCU 07-2, Order Denying Motion to Exclude Evidence (Nov. 26, 2008).

The regulation of interstate traffic was so important to the Board because the intrastate traffic in this dispute is *de minimis* (Petition at 30) and the Board could not provide Qwest the relief it sought by regulating intrastate traffic alone. In fact, the entire predicate for the case rested on interstate communications. The Board justified its action on the grounds that the amount of terminating access traffic "dramatically increase[d]," creating "a substantial increase in the long distance traffic to the LEC's numbers, sometimes 100-fold," which amounts to "abnormally high volume of incoming calls." Final Order at 2, 7, 8. The Board also notes that certain LECs "entered into agreements with free conference calling companies that were intended to increase traffic volumes by 10,000 percent or more[.]" *Id.* at 2. It also states that the disputed arrangement between LECs and their customers "creates a substantial increase in the long distance traffic to the LEC's numbers, sometimes 100-fold." *Id.* at 7. "QCC claims that the FCSCs guaranteed a certain volume of traffic to the Respondents, some exceeding one million minutes of traffic per month." *Id.* at 54. "In the year FCSC services were initiated, the Respondent billed QCC for nearly 60 million access minutes, a 100-fold increase in toll traffic." *Id.* at 58. As a result, certain LECs sought "to collect millions of dollars from interexchange carriers[.]" *Id.* at 2.

But the traffic within the Board's jurisdiction was *de minimis* at best. In fact, the only credible evidence in the case for the traffic in dispute — traffic originated and terminated within the State of Iowa — proves that Great Lakes and Superior sought to collect $64,248.39 and $16,032.68, respectively, for a total of $80,281.07 from interexchange carriers.[9] This amount represents less than 4% of the conference call, chat-line, and international VoIP traffic terminated by Great Lakes and Superior. The intrastate portion of this dispute is so slight that, early in this proceeding two years ago, one of the Iowa LECs offered to refund the intrastate

[9] Petition at 30.

revenues it had collected because they were insignificant compared to the legal costs the carrier would incur if forced to participate in the IUB's proceeding.[10] That request was summarily dismissed by the IUB.[11]

The Board's dismissal of an offer to disgorge intrastate access revenues is very telling. Even though the Board claims that the scope of the Final Order is only the regulation of intrastate traffic, and the primary remedy it awards to the IXCs is the recoupment of intrastate access charges, this exchange of funds from LEC to IXC could have been accomplished two years ago. That the Board persisted in its quest to resolve its concerns with traffic to conference call and chat-line service providers is clear evidence that the regulation of intrastate traffic was not its primary concern. Instead, the issues alleged to be associated with the traffic in this case are overwhelmingly interstate, and thus should be resolved by the FCC. There is simply no evidence that intrastate traffic "dramatically increase[d]," "sometimes 100-fold" (Final Order at 2, 58) to justify the radical and far-reaching conclusions in the Final Order.

All of this evidence demonstrates that despite its repeated refrain of being "aware of its jurisdictional limitations," the Board intended to reach matters of interstate communications in order to grant Qwest the relief it wanted. In the following sections, Petitioners address each finding, conclusion, and ordering clause that reify the Board's intent and should be preempted.

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[10] Docket FCU 07-2, Motion to Dismiss Moot Complaint Against Reasnor Telephone Company, LLC (June 8, 2007).

[11] Docket FCU 07-2, Order Denying Motion to Dismiss Moot Complaint, Granting Supplemental Motion to Compel, Denying Motion for Reconsideration, Granting Motion to Extend Hearing, and Setting Hearing, and Setting Amended Procedural Schedule (July 3, 2007).

I. THE ORDER CONTAINS MANY ITEMS THAT DIRECTLY IMPACT INTERSTATE COMMUNICATIONS OR ENCROACH ON THE COMMISSION'S JURISDICTION AND THUS ARE *ULTRA VIRES*

As the Petition explains, the Iowa proceeding involved several disputes that either directly regarded federal law — such as whether Great Lakes could rely on the rural exemption created in the *Seventh Report and Order*[12] — or involved matters in which intrastate and interstate traffic was inextricably intertwined — such as the definition of "end user" for purposes of assessing terminating access charges. Petition at 11-12 (citing and quoting Qwest's Proposed Findings of Fact and Conclusions of Law). Petitioners' Opposition further demonstrated, based on the Decision Meeting transcript, that the Board reached final conclusions on these issues, pronouncing several decisions such as that the filed tariff doctrine does not apply to the Iowa LECs' access service (Opp. at 2 (quoting Tr. at 1)) and that the conference call and chat line providers are not "subscribing end users" of the Iowa LECs (Opp. at 3 (quoting Tr. at 2)).[13] According to the Supreme Court, state actions that encroach upon matters of interstate communications that Congress expressly placed in the Commission's exclusive jurisdiction warrant preemption. *Louisiana PSC*, 476 U.S. at 368. This type of preemption is also called "express preemption." *See, e.g., Time Warner Cable v. Doyle*, 66 F.3d 867, 875 (7th Cir. 1995) (affirming FCC order stating that Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 521-559, preempted state action).

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[12] *Access Charge Reform and Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-98, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, (2001). Petitioners note that the rural exemption issue was not raised in Qwest's Complaint to the Board. Rather, Qwest raised it in subsequent pleadings, such as its testimony, without amending its Complaint. The Board initially issued an opinion on whether the rural exemption applies to Great Lakes, Tr. at 6, but refrained from doing so in the Final Order (at 69), possibly because that issue was among those for which Petitioners sought the Commission's preemption. Petition at 11.

[13] The "Iowa LECs," who were the Respondents before the Board, are Petitioners, Farmers Tel. Co. of Riceville, Iowa, Farmers & Merchants Mut. Tel. Co. of Wayland, Iowa, Interstate 35 Tel. Co., Dixon Tel. Co., Reasnor Tel. Co., LLC, and Aventure Communication Technology, LLC.

The Supreme Court made clear even prior to the Communications Act of 1934 that "matters of interstate communications are entrusted to federal agencies, … 'The separation of the intrastate and interstate property … is essential to the appropriate recognition of the competent governmental authority in each field of regulation.'" Petition at 5 (quoting *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 148 (1930)). Within the Communications Act itself, Congress included language evidencing a clear intent that interstate communications must be entrusted to the exclusive jurisdiction of the Commission. *Id.* at 4-5 (quoting 47 U.S.C. §§ 151, 152(a)). Indeed, the purpose of the Communications Act was

> … to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, **Nation-wide, and world-wide wire and radio communication service** with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, …

47 U.S.C. § 151 (emphasis added).

The Commission was thus established

> … for the purpose of securing a more effective execution of this policy by **centralizing authority** heretofore granted by law to several agencies and by **granting additional authority with respect to interstate and foreign commerce in wire and radio communication** …

Id. (emphasis added).

Congress specifically placed all tariffs offering interstate communications within the exclusive jurisdiction of the Commission:

> Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, **as the Commission may by regulation require**, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places **as the Commission may require**.

Id. § 203 (emphasis added).

> Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, **the Commission may** either upon complaint or upon its own initiative without complaint, upon reasonable notice, **enter upon a hearing** concerning the lawfulness thereof[.]

Id. § 204 (emphasis added).

In the event that any entity is injured by the rates, terms, or conditions in an interstate tariff, or the application thereof, the Commission has exclusive jurisdiction to hear complaints:

> Any person, any body politic, or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition ...

Id. § 208(a).[14]

The Commission also has exclusive jurisdiction to award damages in a complaint regarding interstate communications:

> If, after hearing on a complaint, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

Id. § 209.

Those matters which Congress entrusted to the Commission in the Communications Act empower the Commission to preempt any state action that encroaches thereupon. As the Supreme Court has stated,

> When the Federal Government acts within the authority it possesses under the Constitution, it is empowered to pre-empt state laws to the extent it is

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[14] Thus, for example, the Commission has held that a carrier must use the complaint process to dispute the imposition of tariffed charges rather than simply refusing to pay them. *E.g., Bell Atlantic-Delaware, et al. v. Frontier Communications, et al.*, Memorandum Opinion and Order, 14 FCC Rcd. 16050, 16068 ¶ 27 (Com. Car. Bur. 1999), *aff'd* 15 FCC Rcd. 7475 (2000); *Business WATS, Inc. v. American Tel. & Tel. Co.*, 7 FCC Rcd. 7942 ¶ 2 (1992).

> believed that such action is necessary to achieve its purposes. The Supremacy Clause of the Constitution gives force to federal action of this kind by stating that "the Laws of the United States which shall be made in Pursuance" of the Constitution "shall be the supreme Law of the Land."

City of New York v FCC, 486 U.S. 57, 63 (1988) (quoting U.S. CONST., Art. VI, cl. 2) (affirming Commission preemption of state technical standards for cable transmissions).

The Commission even has authority to preempt a state agency decision that is otherwise lawful if that decision thwarts competition in the wireline telephone market. It may "take appropriate measures," including the preemption of state activity, when

> otherwise legitimate state actions regulating intrastate telephone service could interfere with the Commission's achievement of its **valid goal of providing interstate telephone users with the benefits of a free market and free choice.**[15]

The Commission has employed its preemption authority to protect Voice over Internet Protocol ("VoIP") services from state regulation. *Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007). When the Minnesota Department of Commerce filed a complaint against Vonage for providing VoIP-based "Digital Voice" service without complying with typical "telephone service" regulations, the Commission granted Vonage's petition for preemption under *Louisiana PSC*. The preemption order was affirmed by the Court of Appeals for the Eighth Circuit on the ground that VoIP service is not separable into its intrastate and interstate components, *id.* at 578-79, and because permitting state-based VoIP regulation would be an obstacle to the Commission's policy of "promoting competition and the public interest." *Id.* at 580.

This proceeding regards actions by the Iowa Utilities Board that overstep the boundary between state and federal jurisdiction, principally by purporting to interpret federal

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[15] *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d 422, 429 (D.C. Cir. 1989) (remanding Commission order preempting state regulation of inside wiring for determination whether "it can show that the state regulation negates a valid federal policy") (emphasis added).

tariffs and to decide whether interstate access service is compensable. The genesis of the Board's error begins with its having assumed the authority to interpret federal access tariffs, an action which is outside its jurisdiction to do:

> [T]he **review and rejection by a state regulatory agency of a federal tariff** is in direct conflict with the Communications Act of 1934 and **is preempted under the Supremacy Clause** of the United States Constitution.

MCI Telecomms. Corp. v. Com. of Virginia State Corp. Comm'n, 11 F.Supp.2d 669, 675 (E.D. Va. 1998) (emphasis added), *vacated as moot sub nom. MCI Telecomms. Corp. v. State Corp. Comm'n*, 178 F.3d 1285 (4th Cir. 1999) (Table) ("all parties now agree that MCIV neither imposed nor collected the charges"). In *MCI*, the Virginia State Corporation Commission ("SCC") attempted to prevent MCI-Virginia from enforcing a tariff that included rates to recoup contributions to the Universal Service Fund and an item called a "National Access Fee." MCI obtained summary judgment on its claim that the SCC's actions were preempted by the Communications Act, because "[i]t is the role of the FCC and the appropriate appellate courts to determine the viability of filed tariffs." *Id.*

Preemption is likewise warranted here. As described in detail in the items below, the Final Order rests on the Board's interpretation of federal law, as expressed in the Iowa LECs' interstate access tariffs, and contains findings and conclusions that necessarily decide whether the LECs' interstate access service is compensable. In several instances, the Board simply refused to limit its ruling to intrastate traffic, and relied upon evidence of interstate call traffic in order to reach its desired conclusion. In addition, the Board interpreted the NECA Tariff No. 5 — the NECA interstate access tariff — which is outside its jurisdiction to do. *MCI*, 11 F. Supp. 2d at 675. In the most obvious example of overreaching, the Board issued a decision with regard to the LECs' use of numbering resources, and has aggrandized the authority to "direct" NANPA to reclaim Great Lakes's numbers, which is far outside the limited delegated authority it has under

47 U.S.C. § 251(e) and the Commission's Rules. The Board could have limited its analysis or its ordering clauses to intrastate law, but it did not, and as a result has trespassed on the Commission's exclusive interstate jurisdiction.

In order to avoid further mischief by the Board on others State Commissions and the FCC must act here. All of these items should be preempted as a direct infringement on the exclusive interstate authority that Congress expressly granted to the Commission. *Louisiana PSC*, 476 U.S. at 368. Each item below is quoted directly from the Final Order, pages 77-81.

1. Finding of Fact No. 7: The filed tariff doctrine does not apply to the Respondents in this case.

This item directly encroaches on the Commission's exclusive interstate jurisdiction. *E.g.*, 47 U.S.C. §§ 203, 204. On its face, Finding of Fact No. 7 speaks to all traffic, to all of the Iowa LECs, under all of their tariffs whether intrastate or interstate. In fact, the Board dismissed the LECs' argument below that the filed tariff doctrine applied in this case with the statement, "[t]he FCSCs[16] were not end users of the Respondents under the tariffs and therefore the tariffs do not apply to these calls." Final Order at 34.

The Board has no jurisdiction to hold that any interstate tariff may properly be applied to any entity. This Finding thus contravenes Congress's express grant of exclusive interstate jurisdiction to the Commission and should be preempted. *Louisiana PSC*, 476 U.S. at 368.

Petitioners not also that the Commission has already interpreted the same NECA Access for the same LEC, Farmers and Merchants Mutual Telephone Company, against the same IXC, Qwest. It determined that conference-call and chat-line service providers *were* end users of

[16] "FCSC" stands for "Free Calling Service Provider." Qwest created this term and the Board has adopted it This term refers to the conference call, chat-line, and VoIP-based international calling service providers to whom the Iowa LECs, including Petitioners, provide local exchange service. The retail customers of the IXCs have used these services, thus generating call traffic to the Iowa LECs for which they have billed tariffed terminating access charges.

LECs providing them End User Access Service: "Qwest asserts that the conference calling companies are not end users, and that therefore delivering calls to them does not constitute terminating access service. The record indicates, however, that the conference calling companies *are* end users as defined in the tariff, and we therefore find that Farmers' access charges have been imposed in accordance with its tariff." *Farmers and Merchants Order*, 22 FCC Rcd. at 17987 ¶ 35.[17] Because the NECA Access Tariff applies to these calls, the filed tariff doctrine necessarily also applies to these calls. The Board's conclusion, however, purports to state that **no** tariff, intrastate or interstate, applies, and thus no Iowa LEC may rely on the filed tariff doctrine in order to enforce the terms of either its intrastate or interstate access tariff. As such, the Board has overstepped its jurisdictional bounds, and the Commission should preempt Finding of Fact No. 7. The Commission also should issue a declaratory ruling that no State Commission may opine on whether an interstate tariff applies to any call traffic.

2. Finding of Fact No. 9: At least one Respondent has improperly assigned all of its telephone numbers to FCSCs, which are not end users.

This finding purports to state that the numbers assigned to the Iowa LECs by NANPA are being misused. Yet the principal authority for regulating telephone numbers lies with the Commission, 47 U.S.C. § 251(e), and State Commissions are not empowered to make policy decisions regarding to whom numbers may be given. *See* 47 C.F.R. § 52.15(i). This Finding of Fact is thus far outside the Board's quite limited authority to deal with numbers.

The Commission has "**exclusive jurisdiction** over those portions of the North American Numbering Plan that pertain to the United States" and was required by Congress to "create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis." 47 U.S.C. § 251(e)(1) (emphasis

[17] The Order on Reconsideration does not change this result. *See* page 19, *infra*.

added). The Commission is permitted to delegate numbering authority to the States, *id.*, but it has done so in very limited fashion.

In 2000, the Commission established rules for the reclamation of telephone numbers in order "to ensure the return of unused numbers to the NANP inventory for assignment to other carriers." *In the Matter of Numbering Resource Optimization*, Report and Order and Further Notice of Proposed Rule Making, CC Docket 99-200, FCC 00-104, 15 FCC Rcd. 7574, 7579 ¶ 5 (2000) ("*Numbering Resource Optimization Order*"). The Commission empowers State Commissions to participate in the reclamation of numbers only in instances in which assigned numbers have not been activated at all:

> State commissions may investigate and determine whether service providers ***have activated their numbering resources*** and may request proof from all service providers that numbering resources have been activated and assignment of telephone numbers have commenced.

47 C.F.R. § 52.15(i)(2) (emphasis added). If after investigation "the state commission is satisfied that the service provider has not activated and commenced assignment" of numbers "within six months of receipt," then under delegated authority the state may inform NANPA that reclamation is appropriate. *Id.* § 52.15(i)(5). The Rules also afford, however, to the investigated LEC a process by which the

> State Commissions ***shall provide*** service providers an opportunity ***to explain the circumstances causing the delay in activating and commencing assignment of their numbering resources*** prior to initiating reclamation.

Id. § 5.15(i)(4) (emphasis added). Great Lakes was given no such opportunity to explain anything with regard to its numbers which, as has been long conceded in this case, are activated and in use.

The purpose of number reclamation, and of giving states a limited role in this function, is to prevent carriers from hoarding numbers that another competitor may need in order

to serve customers. 47 C.F.R. §§ 52.105, 52.107 ("warehousing" and "hoarding" toll-free telephone numbers are unreasonable practices under the Act). Nothing in Section 251 or the Commission's rules indicates that a State Commission may "direct" NANPA to reclaim numbers that are in use.

The Final Order creates an apparently unprecedented situation in which a live telephone number, one that is demonstrably in use, is being shut down based on a state agency's finding of 'improper assignment.' *See* Final Order at 78. The Board has no jurisdiction to perform this action. 47 U.S.C. § 251(e)(1). Accordingly, the Commission should preempt the Board in its attempt to improperly regulate the use of numbering resources as it has done in Finding of Fact No. 9. *E.g.*, *City of New York*, 486 U.S. at 63.

3. **Ordering Clause No. 1: The Board finds that the Respondents named in this complaint violated the terms of their access tariffs when they charged QCC, Sprint, and AT&T for terminating switched access fees for the traffic at issue in this case.**

By its very terms, this Ordering Clause is not limited to the Iowa LECs' intrastate tariffs. This omission is not mitigated by the phrase "for the traffic at issue in this case," because the Board's evidentiary rulings in Docket FCU 07-2 allowed, as noted in the Introduction and Summary above, a vast amount of evidence about interstate traffic, including evidence about the path of interstate calls, the number of terminated interstate minutes, and the operation of the NECA tariff, into the record. *See supra* at 2-3. Petitioners thus must hereby request that the Commission expressly limit this Ordering Clause to interstate traffic and tariffs only, in order to avoid any attempt to enforce the Final Order on an interstate basis.

The Board denied the motions to dismiss of various Iowa LECs that argued that the scope of the dispute actually was federal in nature. *See supra* at 3-4. The Board also denied Petitioners' motion to exclude interstate evidence. *Id.* Had the Board resolved these motions in

a manner expressly stating that it would reach no finding and enter no relief that regarded interstate tariffs, practices, or revenue, then Ordering Clause No. 1 may be less of a concern. The Board refused to do so, however, and instead weighed, reviewed, interpreted and expressly relied upon evidence regarding the volume of interstate traffic and the terms of interstate tariffs. *E.g.*, Final Order at 7 (regarding "long distance traffic" and "interstate" NECA access rates), 18 (interpreting NECA access tariff). And having relied upon tariffs and evidence that are outside its intrastate jurisdiction, the Board inevitably reached conclusions that overstep its jurisdiction such as Ordering Clause No. 1.

As Petitioners explained in their Emergency Motion for Stay,[18] the foundation of the Final Order lies almost wholly in the IUB's characterization of the operation of the NECA Pool. The Final Order begins with an explication of how, in the Board's estimation, carriers within the NECA Pool rate and assess interstate access charges, including the opt-out mechanism by which a carrier may charge an interstate access rate that is higher than the NECA rate for two years. Final Order at 6-7. All of these issues are a matter of interstate communications over which the Board has no jurisdiction. *E.g.*, 47 U.S.C. §§ 203, 204. Yet this portion of the Final Order informs, along with evidence regarding interstate call volumes, Final Order at 7, the Board's entire disposition of the case. The fact that the Board refused to insert the word "intrastate" into this ordering clause thus cannot be deemed a mere oversight, but rather simply a continuation of its extra-jurisdictional rationale throughout the case.

The Commission therefore should hold that Ordering Clause No. 1 is preempted on the ground that it exceeds the Board's intrastate jurisdiction. In addition, the Commission should issue a declaratory ruling that it is unlawful for any State Commission to opine on whether any carrier has "violated" the terms of any of its interstate tariffs.

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[18] WC Docket No. 09-152, Great Lakes Communication Corp. and Superior Telephone Cooperative Emergency Motion for Stay of Iowa Utilities Board Final Order Pending Review (Oct. 1, 2009) ("Motion for Stay").

4. **<u>Ordering Clause No. 3</u>: The Board directs QCC,[19] Sprint, and AT&T to file their calculations of the amount of terminating switched access fees for the traffic at issue in this case and eligible for refund or credit within 30 days of the date of this order. QCC, Sprint, and AT&T are authorized to conduct additional discovery to make those calculations if necessary.**

This Ordering Clause encroaches on the Commission's authority, because it fails to identify which "terminating switched access fees" are at stake — intrastate or interstate. And though it includes, as does Ordering Clause No. 1, the phrase "for the traffic at issue in this case," the Board's consideration of evidence regarding interstate traffic and the policy underpinnings of the NECA interstate access tariff render it quite possible that this relief applies to interstate access revenues. At the very least, Petitioners anticipate that Qwest and the other IXC parties in Docket FCU 07-2 will attempt to enforce the Final Order in that manner. And the fact that in other items, such as Finding of Fact No. 10 (*see* Section II.3, *infra*) do include the word "intrastate" indicates that the Board intended to reach interstate traffic and revenues.

It cannot be disputed that a state agency has no jurisdiction or authority to order any carrier to disgorge or refund revenue accrued from interstate communications. As explained above, Congress gave the Commission exclusive authority over interstate tariffs, 47 U.S.C. §§ 203, 204, and any dispute regarding the terms or application of interstate tariffs is likewise within the Commission's jurisdiction to decide. *Id.* § 208. That exclusive jurisdiction also applies to orders requiring refunds of revenue acquired under interstate tariffs. *Id.* § 209.

The Commission should preempt Ordering Clause No. 3 as an attempt by the Board to force the Iowa LECs to refund interstate access charges imposed under interstate tariffs. Because the Board has failed to make clear that Ordering Clause No. 3 applies only to revenue acquired under intrastate access tariffs, the Commission should clarify that point itself.

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[19] "QCC" is Qwest Communications Corporation, the IXC entity of Qwest that brought the complaint.

Petitioners also respectfully request that the Commission issue a declaratory ruling stating that no State Commission may order any carrier to refund or disgorge interstate revenue of any kind.

5. Ordering Clause No. 7: The North American Numbering Plan Administrator and the Pooling Administrator are directed to commence reclamation proceedings of all blocks of telephone numbers assigned to Great Lakes Communications [*sic*] Corp.

This item is the most flagrant example of the Board's attempt to regulate federal communications. State Commissions are not permitted to "direct" NANPA to reclaim numbers, and nothing in 47 U.S.C. § 251(e), the federal statute governing numbering resources, or the Commission's implementing rules, 47 C.F.R. §§ 52.1-52.111, authorizes a State to determine how active numbers may be used. The Commission should preempt Order Clause No. 7 as a direct infringement on the exclusive jurisdiction that Congress expressly granted to it. *Louisiana PSC*, 476 U.S. at 368.

The error in this Ordering Clause flows from the jurisdictional overreaching in Finding of Fact No. 9 discussed above. *See* Section I.2, *supra*. The Board aggrandized the power to create and enforce a policy regarding the use of numbers, and now purports to "direct" NANPA to reclaim Great Lakes's numbers.

The error in this item also flows from the Board's deliberate refusal to follow the Commission's controlling precedent in the *Farmers and Merchants Order*. The Board seeks to strip Great Lakes's numbers based on its decision that a calling service provider cannot be an "end user," even when the LEC's tariff definition of that term matches the definition on which the Commission relied in the *Farmers and Merchants Order* to hold that conference call providers *are* end users. 22 FCC Rcd. at 17987 ¶ 38. This error is addressed extensively in Section II below. Because Great Lakes had no other "end users," the Board concluded that Great Lakes "should not have numbers activated for pure [conference-calling] use." *Id.* The IUB did

not find, however, that the numbers had never been *activated*, a threshold determination that must be made before reclamation may be commenced. 47 C.F.R. § 52.15(i). Great Lakes's telephone numbers, however, had been activated; otherwise, it would not have been able to terminate telephone calls or generate bills for interstate switched access service.

In addition, cognizant of the Act's prohibition against inequitable treatment by state commissions, the Commission has prohibited state commissions from using delegated authority as a tool to deny a telecommunications provider equitable access to telecommunications numbers. *See generally* 47 C.F.R. § 52.9. Thus, because the Final Order has the undeniable (and clearly intended) effect of denying Great Lakes the ability to provide either intrastate *or interstate* services, it is *ultra vires* and should be preempted.

Further, the Final Order contradicts the spirit and intent of the 1996 Act and the FCC's limited delegation of authority to state commissions. Indeed, the FCC cautioned states against using delegated numbering planning authority to hinder telecommunications providers such as Great Lakes and their customers. *See Numbering Resource Optimization*, Second Report and Order on Reconsideration, 16 FCC Rcd. 306, 334 ¶ 60-61 ("*Second Numbering Resource Optimization Order*"). In the *Second Number Resource Optimization Order*, the FCC clearly and succinctly stated:

> [N]umbering administration **should promote entry into the communications marketplace** by making numbering resources available on an efficient and timely basis, **should not unduly favor or disadvantage a particular industry segment** or group of consumers, and should not unduly favor one technology over another.
>
> * * *
>
> *Under no circumstances* should consumers be precluded from receiving telecommunications services of their choice from providers of their choice for a want of numbering resources. For consumers to benefit from the competition envisioned by the 1996

> Act, it is imperative that **competitors in the telecommunications marketplace face as few barriers to entry as possible.**

Id. (emphasis added).

Indeed, the pro-competitive mandate of the Telecommunications Act should be front and center when a state commission exercises authority delegated by federal law. *See, e.g., WWC License, L.L.C. v. Boyle*, 459 F.3d 880, 891 (8th Cir. 2006) ("all else being equal, if a provision of the Act is vague we are inclined to interpret the provision in a manner that promotes competition").

Even assuming *arguendo* that the Board had the authority to order the reclamation of activated telephone numbers, the only grounds for such reclamation — that conference-call service providers are not "end users" under the terms of the NECA interstate access tariff — is fatally flawed and in conflict with federal law, as discussed in Section II below. The Commission therefore should preempt Ordering Clause No. 7, and issue a declaratory ruling that State Commissions may not "direct" NANPA to reclaim telephone numbers.

II. THE ORDER REFUSES TO FOLLOW, LET ALONE ACCORD DEFERENCE TO, THE *FARMERS AND MERCHANTS ORDER* AND THE COMMISSION'S OTHER ACCESS CHARGE-RELATED PRECEDENT

The Board rejected this Commission's findings and refused to comport with the rulings in *Farmers and Merchants*, and did not even provide analysis of the Commission's apposite decisions in *Jefferson*,[20] *Beehive*,[21] or *Frontier*.[22] Having ignored this controlling precedent, the Board reached conclusions on the ultimate questions of Qwest's complaint that are the opposite of the Commission's conclusions on the same questions. As such, it directly conflicts with federal law. According to the Supreme Court in *Louisiana PSC*, preemption of

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20 *AT&T Corp. v. Jefferson Tel. Co.*, Memorandum Opinion and Order, 16 FCC Rcd. 16130 (2001)

21 *AT&T v. Beehive Tel. Co.*, Memorandum Opinion and Order, 17 FCC Rcd. 11641 (2002)

22 *AT&T Corp. v. Frontier Commc'ns of Mt. Pulaski, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd. 404 (2002).

state action is appropriate where "there is an outright or actual conflict between federal and state law." 476 U.S. at 368. This type of preemption has come to be known as "conflict preemption." *E.g.*, *Kinley v. Iowa Utils. Bd.*, 999 F.3d 354, 358 n.3 (8th Cir. 1993) (federal Hazardous Liquid Pipeline Safety Act preempts state regulation).

The following five items, repeated *verbatim* from the Final Order, directly conflict with federal law and thus should be preempted.

1. **Finding of Fact No. 1: The FCSCs did not subscribe to the Respondents' intrastate switched access or local exchange tariffs.**

This Finding of Fact creates an "outright or actual" conflict between purported Iowa law, under the Final Order, and the Commission's *Farmers and Merchants Order* which states that conference call providers do in fact "subscribe" to service. 22 FCC Rcd. at 17987 ¶ 38. Much like the conclusion that conference call and chat-line providers were not "end users" discussed below, *see* Section II.2, *infra*, the Board concluded that these entities did not "subscribe" to the LECs' switched access or local exchange tariffs. The Board's criteria for defining "subscribe," however, were inconsistent with the interpretation of the federal tariff previously provided by the Commission. As discussed above, End User Access Service is provided to end users, which are defined in the NECA access tariff as "any customer of an interstate or foreign telecommunications service that is not a carrier." NECA Access Tariff No. 5 § 2.6. "Customer" is defined as any entity "which subscribes to the services offered under this tariff." *Id.* The NECA tariff provides no further definition of "subscribes," although the term is used extensively throughout the tariff as in "subscriber lines." *See id.* § 1.3 ("This tariff complies with this Order and Rule requirement and may be referenced by small companies that serve fewer than 50,000 subscriber lines and are described as subset 3 carriers[.]"); § 8 (Digital

Subscriber Line Access Services).[23] A LEC subscriber is simply someone who requests and receives local exchange service.

The conference call and chat-line providers likewise are "customers" under the LECs' local exchange tariffs. The Great Lakes and Superior local exchange tariffs provide extremely broad discretion to establish service arrangements with customers without regard to the arbitrary criteria employed by the Board. The term "Customer" is defined in the Superior local exchange tariff as "[t]he individual, carrier, reseller, partnership, association, corporation or government agency which contracts for telephone service, or relays messages to or from points outside the extended area, and is responsible for the payment of charges and compliance with the rules and regulations of the Company."[24] Although the Great Lakes local exchange tariff does not have a definition of "Customer," the language in the tariff largely mirrors the language in the Superior tariff, so it is reasonable to conclude that the Great Lakes definition of "Customer" would also mirror the Superior definition.

Both tariffs also provide that "Applications for service may be made orally or in writing. These applications become contracts upon the establishment of service."[25] "Contracts" are defined as "The agreement between a customer and the Company under which services and facilities are furnished in accordance with the applicable provisions of the tariff."[26] Thus, all one needs to do to become a "customer" of both Great Lakes and Superior is agree, orally or in writing, to accept telephone service. In addition, the Great Lakes local exchange tariff provides for the ability to make individual-case-basis agreements with customers: "Nothing in this tariff

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[23] "Subscriber lines" are defined specifically for the purposes of the Transition Billing Arrangements for Switched Access Service, and Measuring Access Minutes (Feature Group B) Sections as "exchange service lines, Centrex lines and Centrex-type lines provided by the Telephone Company under its local and/or general exchange service tariff[.]" *Id.* §§ 6.4.1(C)(4)(b)(2); 6.6.4.

[24] Superior Telephone Cooperative Telephone Tariff, Sheet 24

[25] *Id.*, General Rules and Regulations, Section D.1.a.; Great General Lakes Communication Corp. Telephone Tariff, General Rules and Regulations, D.1.a.

[26] Superior Telephone Cooperative Telephone Tariff, Sheet 23.

shall restrict the company's right to offer lines or services to governmental and business entities by special contract."[27] Clearly, the conference-call and chat-line service providers served by Great Lakes and Superior qualify as "customers" under the terms of their local exchange tariffs.

Qwest asserted the same argument at the Board that it made to the Commission in the *Farmers and Merchants* case: to "subscribe" to local exchange service requires the payment of money, so if the revenue-sharing arrangement with the LEC actually results in a payment from the LEC to the end user, that entity necessarily cannot be a "subscriber." Final Order at 20-21; *see also Farmers and Merchants Order*, 22 FCC Rcd. at 17987 ¶ 37 (reciting Qwest argument). The Commission rejected this argument by recognizing that there is no payment obligation in order to "subscribe" to something: "Qwest offers scant support for its assertion that one cannot subscribe to a service without making a net payment to the service provider." *Farmers and Merchants Order*, 22 FCC Rcd. at 17987 ¶ 38. The Commission recognized that "subscribes" means simply "to enter one's name for a publication or service." *Id.* The Commission thus concluded that "[t]he record shows that the conference calling companies did subscribe, *i.e.*, enter their names for, Farmers' tariffed services." *Id.* The Commission has even made clear to consumers that "The maximum allowable access charges per telephone line are set by the FCC, but local telephone companies are free to charge less or nothing at all." FCC Consumer Facts, "Understanding Your Telephone Bill."[28]

The Board, on the other hand, came to exactly the opposite conclusion for the same term "subscribes" in the NECA interstate tariff: "The Board finds that the lack of timely, legitimate billing for tariffed services by the Respondents demonstrates that the FCSCs did not actually subscribe to a billable tariffed service." Final Order at 24. Not only did the Board graft a billing requirement onto the term "subscribes" that simply is not supported by the language in

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27 General Lakes Communication Corp. Telephone Tariff, General Rules and Regulations, A.1.d.

28 Available at <http://www.fcc.gov/cgb/consumerfacts/understanding.html>.

either the NECA interstate tariff, the ITA intrastate tariff, or the Great Lakes and Superior local exchange tariffs, the Board further qualified that billing obligation to essentially require a local exchange service line item on the revenue-sharing remittances sent from the LECs to their end users. Final Order at 25-26. Again, nothing in the Petitioners' tariffs requires any such thing. While there are plenty of detailed instructions of what a LEC *may* bill an end user for, it does not identify what a LEC *must* bill an end user for, and no one would claim that every bill must have every billing item identified in the NECA tariff.

The Board tries to dismiss net-payment arrangements for services to FCSCs by misreading the *Farmers and Merchants* Order on Reconsideration and giving it greater importance than it deserves. Final Order at 31-32. As discussed below, the Order on Reconsideration did not change the terms of the *Farmers and Merchants* decision. *See infra* at 23. Its conclusion — that merely entering one's name for tariffed services, in other words agreeing to take service from the LEC, is sufficient to satisfy the "subscribes" requirement to be a "customer," and hence an "end user" receiving End User Access Service under the NECA interstate tariff—is binding as federal law. The Final Order thus contravenes federal law and should be preempted. *Louisiana PSC*, 476 U.S. at 368.

2. Finding of Fact No. 2: FCSCs are not end users as defined by the Respondents' tariffs.

This Finding of Fact is directly contrary to the Commission's holding in the *Farmers and Merchants Order* that the conference service providers which Farmers and Merchants serves are "end users." 22 FCC Rcd. at 17987 ¶ 38.

Qwest argued to the Commission in the *Farmers* case that conference call traffic is not compensable because conference service providers cannot be deemed the "end users" of a LEC. *Id.* at 17987 ¶ 35. The FCC was provided with a substantial record on that question after

an extensive discovery process. The FCC had a full record of invoices, call records, and evidence of how the LEC set up and performed its revenue-sharing arrangement with the conference call providers. *Id.* at 17986, 17987, ¶¶ 33, 35-38. The FCC also had the LEC's access tariff which relied on NECA Tariff No. 5. *Id.* at 17987 ¶ 38.

The FCC then found that the conference bridge providers are the "end users" of the LEC under both the LEC's tariff and a reasonable interpretation of the relationship between these parties. *Id.* at 17987 ¶ 38. The FCC applied the definition of "end user" in NECA Tariff No. 5 which is "'any customer of an interstate or foreign telecommunications service that is not a carrier.'" 22 FCC Rcd. at 17987 ¶ 36 (quoting NECA Tariff § 2.6).

In spectacular disregard for this Commission, the IUB opined that it had a better record than the FCC in the *Farmer's* case[29] and went on to reach the directly opposite conclusion based on the very NECA interstate access tariff. Final Order at 20, 31. To accomplish this feat, the Board had to ignore the *Farmers and Merchants Order*; indeed, Qwest instructed the Board to "ignore" *Farmers and Merchants* in its post-hearing brief. Thus, the Board declared that the *Farmers and Merchants Order* is not final. Final Order at 29. Having done so, the Board ignores every finding and conclusion in that order.

As Petitioners and others of the Respondents argued before the Board, the Commission never has stated that the *Farmers and Merchants Order* is vacated, reversed, stayed, or otherwise invalid precedent. All that the Commission did was to grant Qwest additional discovery rights and to submit additional post-decision evidence. Order on Reconsideration, 23 FCC Rcd. 1615 ¶ 1. In fact, the Commission was careful to state that "[w]e take no view at this

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[29] At the August 14, 2009 IUB Decision Meeting, Board Member Tanner stated, "the FCC proceeding, Farmers & Merchants, I do not consider final decision [*sic*] at this point and any findings of fact or law based on that record one are not yet final and two I think that this Board has a more complete record than what was before the FCC." IUB Decision Meeting Transcript at 1.

time as to whether that evidence ultimately will persuade us to change our decision on the merits[.]" *Id.* at 1617 ¶ 6. Qwest, who lost the *Farmers* case, nonetheless persuaded the Board that the *Farmers and Merchants Order* was bad law.[30]

State Commissions must defer to FCC rules and decisions, not ignore them. *E.g.*, *SBC Commc'n v. FCC*, 138 F.3d 410, 416-417 (D.C. Cir. 1998) ("Congress has clearly charged the FCC, and not the State commissions, with deciding" matters related to interstate telecommunications service).[31] Having thus ignored the prevailing holding *Farmers and Merchants*, the Board has issued an order that directly contravenes it. Suddenly conference call service providers are not "end users" of the Iowa LECs, one of which is the same Farmers and Merchants carrier that was the Respondent in *Farmers and Merchants*, and yet the FCC held that conference provider entities are in fact "end users."

The Commission can preempt state decisions that establish an "outright or actual conflict" with its decisions. That action is plainly warranted with regard to the Board's "end user" finding. Petitioners thus urge the Commission to preempt Finding of Fact No. 2, and issue a declaratory ruling that conference call and chat-line providers are "end users" of any LEC that adopts the language upon which the *Farmers and Merchants Order* relies.

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[30] Petitioners explained to the Board that Qwest's argument was simply an improper collateral attack on the Commission's order. As the Eighth Circuit Court of Appeals has stated, "[n]o collateral attacks on the FCC Order are permitted." *Vonage Holdings Corp. v. Minnesota Pub. Util. Comm'n*, 394 F.3d 568, 569 (8th Cir. 2004) (affirming injunction against agency on grounds of preemption). Such attacks "unquestionably trample[ ] upon the FCC's authority." *Bennett v. T-Mobile USA, Inc.*, Case No. CV 08-4943 (RSWL), 2008 WL 5622710, *3 (C.D. Cal. Dec. 22, 2008) (dismissing case). The Board nonetheless followed Qwest's instruction.

[31] Qwest may argue, as it has done previously, that the Commission invalidated the *Farmers and Merchants Order* in *Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, Memorandum Opinion and Order, 23 FCC Rcd. 10731 (2008). That assertion is false, because in *InterCall* the Commission expressly stated that "[n]othing in this order is intended to address issues relating to access charge tariffs or other types of intercarrier compensation." 23 FCC Rcd. at 10740 ¶ 19 n.49.

3. Finding of Fact No. 8: The sharing of revenues between Respondents and FCSCs is not inherently unreasonable, but may be an indication that a particular service arrangement is unreasonable.

This Finding of Fact likewise contravenes the Commission's decision in the *Farmers and Merchants Order* as well as several previous orders in which the Commission refused to find LEC revenue sharing unlawful or improper. Moreover, this Finding of Fact, which is the only item that regards the sharing of access revenue, is not half so egregious as the rationale within the Final Order on this point. Revenue sharing has never been deemed unlawful or improper, despite several IXCs entreaties for the Commission to do so, and the Board flies directly in the face of that controlling precedent in holding that any Iowa LEC acted unreasonably by sharing access revenue.

The Final Order contains several pages of discussion on revenue sharing, none of which even acknowledge *Farmers and Merchants*, that establish a much broader (and quite incorrect) holding on revenue sharing. Though this Finding of Fact states that revenue sharing is "not inherently unreasonable," the text of the Final Order states that where a LEC experiences a high volume of terminating access at rates calculated against a low-volume expectation, and "has substantial market power, even monopoly power," then the sharing of revenue "is an unreasonable rate or service arrangement, in the absence of any other factors." Final Order at 58-59. One can be sure that this portion of the Final Order is what the IXCs will rely upon in future proceedings, and it is flatly wrong.

This statement in the Final Order effectively renders the unlawful holding that all LEC sharing of any access revenue — originating or terminating, intrastate or interstate — is unreasonable. For the FCC already has held that LECs (both competitive and incumbent) have "monopoly power ... over access to their end users." *Access Charge Reform Seventh Report and Order*, 16 FCC Rcd. at 9938 ¶ 38. But although the FCC has refused for almost ten years (*see*

supra notes 20-22) and continues to refuse, despite this "monopoly power," to prohibit the sharing of access revenue, the Board's Final Order states that such practices are "unreasonable" absent some unnamed "other factors." Final Order at 59.

The FCC was well aware when it issued its Memorandum Opinion and Order in the *Farmers and Merchants* case that the LEC was sharing access revenue with its conference service provider customers. 22 FCC Rcd. at 17987-88 ¶ 38. The FCC did not hold, or even opine in *dicta*, that such arrangements are unlawful or contrary to the public interest, though it could have done so. In fact, the FCC expressly held that "Farmers' payment of marketing fees to the conference calling companies does not affect their status as customers, and thus end users, for purposes of Farmers' tariff." *Id.* The FCC went on to hold that "[w]e reject Qwest's premise that the conference calling companies can be end users under the tariff only if they made net payments to Farmers." *Id.*

The Commission has been consistent in its refusal to discredit or prohibit revenue sharing. Petition at 6-7. In *Jefferson*, the Commission held that sharing access revenue does not constitute discrimination in violation of either section 201(b) or 202(a) of the Communications Act, 47 U.S.C. §§ 201(b), 202(a). 16 FCC Rcd. at 16133.[32] In *Frontier*, the Commission again refused to hold that sharing access revenue is unlawful discrimination under section 201(b) or 202(a). 17 FCC Rcd. at 4142 ¶ 2. And later that year in *Beehive*, the Commission denied three counts in AT&T's complaint that the LEC had violated section 201(b) and 202(a) by sharing access revenue. 17 FCC Rcd. at 11655 ¶ 29. The Final Order does not even mention any of these three decisions. It thus follows inexorably that the Board would reach a decision — in

[32] Petitioners are aware that the Commission found *Jefferson*, *Frontier*, and *Beehive* not to be controlling authority in the *Qwest v. Farmers and Merchants* dispute. 22 FCC Rcd. at 17986 n. 115. The cases nonetheless are three instances, in addition to *Farmers and Merchants*, in which an IXC argued that revenue sharing is improper and lost. Under four different sets of facts, the Commission has refused to find that revenue sharing is unreasonable.

resolving claims by Qwest that revenue sharing is unlawful discrimination — that directly contravenes these rulings.

The Board has issued a decision that effectively prohibits, unlawfully, LECs from sharing originating or terminating access revenues on both an intrastate and interstate basis. This decision both oversteps the Board's intrastate-only jurisdiction and contravenes federal law. The Commission therefore should preempt Finding of Fact No. 8, and hold that state agencies cannot prohibit LECs from sharing access revenue under federal law.

4. Finding of Fact No. 10: The intrastate toll traffic did not terminate at the end user's premises.

This Finding of Fact, one of the few items that is expressly limited to intrastate traffic, should be preempted on the ground that it directly contravenes the Commission's holding that conference call traffic does indeed "terminate" at the premises of an end user for purposes of the access regime and is compensable. *Farmers and Merchants Order*, 22 FCC Rcd. at 17985-86 ¶¶ 30-34.

Qwest argued to the Commission in *Farmers* that conference calls do not "terminate" with a Farmers end user, but rather they actually flow through the conference bridge of the Farmers end user to the telephone of every other call participant. 22 FCC Rcd. at 17985 ¶ 32. The Commission rejected that notion almost out of hand, stating that "Qwest's view of how to treat a conference call leads to anomalous results." *Id.* at 17086 ¶ 33. The participants in a conference call, the Commission stated, "are actually *call initiation* points." *Id.* (emphasis in original). As a matter of federal law, then, conference calls terminate at the conference bridge. *Id.*

The Commission then held that Farmers can "charge terminating access charges for calls terminated to the conference calling companies" under the Farmer's tariff. 22 FCC Rcd.

at 17988 ¶ 38. Farmer's federal access tariff mirrors the NECA access tariff, as do Petitioners' tariffs, which defines terminating access to mean a pathway to an "end user premises." Under this tariff, the Commission held that conference calls terminate and are compensable. As such, the Commission plainly found that the calls do terminate at a "premises" of an "end user."

The Board reached the opposite result in Finding of Fact No. 10 and thus again stands in direct conflict with federal law. This Finding thus should be preempted. *Louisiana PSC*, 476 U.S. at 368. In addition, the Board has created a scenario in which the LECs cannot comply with both federal law — that conference calls terminate to an end user premises and are compensable — and the Final Order. As explained in Section III below, this error is an independent ground to preempt Finding of Fact No. 10. *Id.*

5. Finding of Fact No. 5: The Respondents did not provide local exchange service to FCSCs through special contract arrangements.

This Finding of Fact also contravenes the Commission's decision in *Farmers and Merchants* by refusing to acknowledge that conference call and chat-line providers use "local exchange service." In *Farmers*, the LEC served conference service providers via individual contracts. 22 FCC Rcd. at 17976 ¶ 10. These entities nonetheless were deemed to be "end users" and "subscribers" according to the Commission, and "Farmers' tariff therefore allows Farmers to charge terminating access charges for calls terminated to" these entities. *Id.* at 17987 ¶ 38.

As stated above, the Board circumvented the Commission's conclusions in *Farmers and Merchants* simply by asserting, without analysis, that the order is not final. Final Order at 29. In itself that assertion constitutes an *ultra vires* agency decision. *See SBC*, 138 F.3d at 416-417. Further, that assertion does not excuse the Board's direct contravention of federal law which states that entities served via contract are in fact "end users." Thus, Finding of Fact

No. 5 creates an "outright or actual conflict" with the *Farmers and Merchants Order*, on a matter involving precisely the same services, and thus should be preempted. *Louisiana PSC*, 476 U.S. at 368. The Commission therefore should preempt Finding of Fact No. 5, and issue a declaratory ruling that the provisioning of local service via special contract is not a ground on which to deny interstate tariffed terminating access charges.

III. THE ORDER CREATES AN IMPOSSIBILITY SITUATION FOR WHICH PREEMPTION IS APPROPRIATE UNDER *LOUISIANA PSC*

As the Petition sets forth, the Supreme Court also held in *Louisiana PSC* that preemption is warranted "where compliance with both federal and state law is in effect physically impossible." Petition at 17 (quoting 476 U.S. at 368). When a State Commission purports to interpret a federal tariff and decides whether its charges are appropriate, as the Board has done with regard to the LECs' federal access tariffs, it necessarily creates a situation in which "compliance with it [the state decision] and federal law is impossible." *MCI*, 11 F. Supp. 2d at 675. As such, it is preempted. *Id.*; *Louisiana PSC*, 476 U.S. at 368.

Here, the Board has issued an order expressly based in the NECA interstate access tariff that opines on what it means to "subscribe" to service, what is an "end user," and how a carrier may enter into individual case basis (or "ICB") contracts. In so doing, the Board places the Iowa LECs in the scenario in which their arrangements for intrastate access service must be materially different than their arrangements for interstate services, such that compliance with both is "physically impossible." 476 U.S. at 368. Accordingly, the Commission should preempt the following three Findings of Fact which are replicated *verbatim* from the Final Order.

1. Finding of Fact No. 1: The FCSCs did not subscribe to the Respondents' intrastate switched access or local exchange tariffs.

This Finding of Fact, which conflicts with federal law as explained in Section II.1, *supra*, creates a situation in which the Iowa LECs must attempt to comply with two opposite definitions of "subscribe." The Board has concluded, by interpreting the NECA tariff, that the conference call and chat-line providers did not "subscribe" to the LECs' switched access or local exchange tariffs. Yet as a matter of federal law, any entity that enters its name for service is a "subscriber" of service. 22 FCC Rcd. at 17987 ¶ 38.

The Final Order thus renders it impossible for the Iowa LECs to provide their access services in a manner that comports with both the Final Order and federal law. It cannot be the case that an intrastate call to a conference call or chat-line provider does not reach a "subscriber," and yet an interstate call to the same entity does in fact reach a "subscriber." Under the access regime, then, the same Iowa LEC cannot be compensated under the Final Order for an intrastate call terminated to a conference service or chat-line provider, but it will be compensated for interstate calls to those same companies. The Board's adoption of a definition of "subscriber" that turns the Commission's definition of "subscriber" on its head has created the impossibility scenario that the Commission is empowered to preempt. *Louisiana PSC*, 476 U.S. at 368. Petitioners thus request that the Commission preempt Finding of Fact No. 1 on this independent ground.

2. Finding of Fact No. 2: FCSCs are not end users as defined by the Respondents' tariffs.

Petitioners address this item in Section II.2 above as meriting preemption due to the Board's infringement on the Commission's interstate jurisdiction. This Finding of Fact also merits preemption on the independent ground that it is directly contrary to the Commission's holding in the *Farmers and Merchants Order*, 22 FCC Rcd. at 17987 ¶ 38. The Board has

purported to render conference call providers non-end users under the NECA access tariff. *See* Final Order at 18, 20. Thus, the Iowa LECs now exist in an environment in which these entities are end users under federal law — entitling them to interstate terminating access charges — but are not end users under state law — prohibiting them from imposing intrastate terminating access. This "impossibility" scenario again typifies what the Supreme Court found in *Louisiana PSC* to be one in which preemption of state action is warranted. 476 U.S. at 368. Petitioners respectfully request that the Commission preempt Finding of Fact No. 2.

3. Finding of Fact No. 5: The Respondents did not provide local exchange service to FCSCs through special contract arrangements.

This Finding of Fact likewise creates a situation in which it is "physically impossible" to comply with both federal law and the Final Order. 476 U.S. at 368. It necessarily covers all call traffic that the Iowa LECs terminate to their end user customers, both intrastate and interstate, and purports to decide that the Iowa LECs' service contracts with conference call and chat-line providers disqualify the LEC from charging terminating access. As such, traffic to those providers, according to the Board, is not compensable under the access regime.

Yet as a matter of federal law, serving calling service providers via contract is not something that disqualifies a call from being eligible for terminating access. The Commission reviewed exactly the same situation with regard to Farmers and Merchants, an Iowa LEC that also was a Respondent before the Board, 22 FCC Rcd. at 17976 ¶ 10, and evidently saw no reason why the service contracts were improper or a bar to recovering terminating access. 22 FCC Rcd. at 17987 ¶¶ 37-38. Yet the Board wishes to bar the Iowa LECs from recovering access under the very same service arrangements, and establishes yet another "physically impossible" situation for which preemption is appropriate. 476 U.S. at 368.

For these reasons and on this independent ground, the Commission should preempt Finding of Fact No. 5, and issue a declaratory ruling that the provisioning of local service via special contract is not a ground on which to deny tariffed terminating access charges.

IV. THE COMMISSION HAS OCCUPIED THE FIELD OF LEC TERMINATING ACCESS CHARGES

As the Petition explains, the Commission has occupied the field with respect to LEC access charges by among other things, having released the Notice of Proposed Rulemaking in WC Docket No. 07-135.[33] Petition at 26-27. Preemption of state action is warranted "where Congress has legislated comprehensively, thus occupying an entire field of regulation[.]" *Louisiana PSC*, 476 U.S. at 368. This type of preemption, often called "field preemption," "'may be inferred if a federal scheme of regulation is so pervasive that Congress must have intended to leave no room for a state to supplement it.'" *Southwestern Bell Wireless Inc. v. Johnson County Bd. of County Comm'rs*, 199 F.3d 1185, 1190 (10th Cir. 1999) (citation omitted). Field preemption occurs under both federal statute and the rules and orders of federal agencies. *Id.*, 199 F.3d at 1192 (FCC orders regulating radio frequency interference preempt state action).

> The NPRM is extremely broad, and initiates
>
> a rulemaking proceeding to examine whether our existing rules governing the setting of tariffed rates by LECs provide incentives and opportunities for carriers to increase access demand endogenously with the result that the tariff rates are no longer just and reasonable.

NPRM ¶ 11.

The topics that this rulemaking addresses cover virtually every aspect of Qwest's complaint to the Board. The Commission already is considering comments on these topics which include how LECs serve calling service providers to whom IXC end users place calls,

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[33] *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, Notice of Proposed Rulemaking, FCC 07-176 (rel. Oct. 2, 2007) ("*NPRM*").

NPRM ¶ 11, the cost basis of LEC access charge, *id.* ¶ 16, and the practice of sharing access revenue, *id.* ¶¶ 18-19.[34] Indeed, the Commission released the NPRM in the knowledge that LEC access charges are the subject of considerable litigation around the country (*id.* ¶ 11 & n.37); plainly its intent is to decide these issues as the agency authorized by Congress to review interstate tariffs, including access tariffs. *E.g.*, 47 U.S.C. §§ 203-204.

The Final Board's Order, which has been released almost two years after the *NPRM* was issued, attempts to decide issues that already are under consideration at the Commission. As just one example, the Board's almost exclusive reliance on an interstate tariff — the NECA interstate access tariff — to support the Final Order thus not only encroaches on the Commission's exclusive jurisdiction, *e.g.*, *MCI*, 11 F. Supp. 2d at 675, but also tramples the very same tariff policy ground that the *NPRM* now occupies. The Final Order thus impermissibly prejudges, or "jumps the gun," on the Commission's comprehensive review of LEC access charges pursuant to the *NPRM.*

Aside from its numerous precedents addressing the proper imposition of access charges, the Commission's establishment of WC Docket No. 07-135 plainly occupies the field of regulating the rates, terms, and conditions under which LECs impose access charges for calls placed to entities like conference call and chat-line providers. *See Louisiana PSC*, 476 U.S. at 368. The Commission is plainly addressing questions such as revenue sharing and service arrangements between LECs and these types of entities which, as demonstrated herein, form the bulk of what the Board is attempting to regulate via the Final Order. In order to ensure uniformity of regulation and the integrity of its authority over these matters, the Commission should preempt the Final Order.

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[34] Revenue sharing, as explained above, has been reviewed four times by the Commission and never found to have violated the Communications Act. *See* Section II.3, *supra.*

V. THE FINAL ORDER "STANDS AS AN OBSTACLE" TO CONGRESS'S AND THE COMMISSION'S LONGSTANDING GOAL OF FOSTERING COMPETITION AND BROADBAND DEPLOYMENT

Preemption of state agency action is also appropriate where that action "stands as an obstacle to the accomplishment and execution of the full objectives of Congress." *Louisiana PSC*, 476 U.S. at 369; *see also* Petition at 18-20; Northern Valley/Sancom Comments at 12-14. The FCC is empowered to preempt state regulations under this criterion where its own stated policy goals are jeopardized. *New York State Comm'n on Cable Television v. FCC*, 669 F.2d 58, 65-66 (2d Cir. 1982) (affirming FCC preemption of New York State cable transmission policy that "stands as an obstacle to the FCC's accomplishment of its objective of promoting the development of an interstate [Multipoint Distribution Service] network"); *see also Minnesota PUC*, 483 F.3d at 580 ("Competition and deregulation are valid federal interests the FCC may protect through preemption of state regulation."). In addition, federal courts may enjoin state orders and regulations that it perceives will "stand[] as an obstacle" to FCC policy. *Verizon New England, Inc. v. Maine Pub. Utils. Comm'n*, 509 F.3d 1, 9 (1st Cir. 2007) (preempting Maine PUC pricing and unbundling rules); *see also NARUC*, 880 F.2d at 429. This type of preemption is sometimes termed "implied conflict preemption." *Metrophones Telecommunications, Inc. v. Global Crossing*, 423 F.3d 1056, 1072-73 (9th Cir. 2005) (federal payphone compensation rules preempt state law claims for breach of implied contract).

The Final Order warrants preemption under the "obstacle" criterion of *Louisiana PSC*. It seeks to shut down Great Lakes and to deprive all of the Iowa LECs of the access revenue that they are owed for having completed calls placed by the IXCs' customers to conference call and chat-line services in Iowa. This result thwarts Congress's, and the Commission's, goals of fostering competition and spurring broadband deployment nationwide.

Congress's goal in enacting the Telecommunications Act of 1996 was "to shift monopoly markets to competition as quickly as possible." H.R. Rep. No. 104-204, 104th Cong. 1st Sess. at 89. Congress dedicated Section 253 of the 1996 Act to eradicating barriers to competition and expressly authorizes the Commission to preempt the "enforcement ..., regulation, or legal requirement" of any state that has "the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. §§ 253(a), (d); *see* Petition at 19. The Commission retains the fostering of competition as a key element of its operating mission, evidenced, for example, in the Commission's "Strategic Plan" for 2009-2014.[35] The Commission's dedication to network neutrality, one principle of which is to protect competition, further demonstrates the importance it ascribes to precompetitive principles.[36]

As the Petition argues, the Board seeks to "de-certify Great Lakes," Petition at 19, and to strip Great Lakes of all of the numbers through which it serves conference call and chat-line service providers. Final Order at 81; *see also* Section I.5, *supra*. Great Lakes, which all parties agree is a CLEC operating in Qwest territory, provides both intrastate — local exchange and access — and also interstate access services in Iowa. One can conceive of no state action that is more injurious to a competitor than stripping its certification and its numbers. As such, the Final Order, as well as any Board action to revoke Great Lakes's certification,[37] contravenes Section 253 and should be preempted.

In addition, the Final Order contravenes Section 253 with regard to all of the Iowa LECs in two ways: first, by exonerating, *ex post facto*, the IXCs for engaging in self-help

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35 *Available at* < http://www.fcc.gov/omd/strategicplan/>.

36 For example, one of the Commission's principles of net neutrality is "To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to competition among network providers, application and service providers, and content providers." *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 02-33, Policy Statement, 20 FCC Rcd. 14986 (2005).

37 "The Board will initiate a subsequent proceeding asking Great Lakes and Aventure to show cause why their certificates issued pursuant to Iowa Code § 476.29, should not be revoked." Final Order at 67.

refusals to pay terminating access; second, by ordering refunds of any amounts actually paid by the IXCs for terminating access. *See* Section I.4, *supra*. As Northern Valley and Sancom argued in their Initial Comments in this docket, the Board's holding that "there is no need for any sanction" against the IXCs for withholding tariffed access charges is "an incredible example of rear-view mirror, *post hoc* rationalization." Northern Valley/Sancom Comments at 17. The Board has contravened several Commission orders denouncing situations in which a carrier simply refused to pay tariffed charges,[38] including the *Seventh Report and Order* which specifically addressed the conduct of the IXCs: "[t]he IXCs' primary means of exerting pressure on CLEC access rates has been to refuse payment for the CLEC access services ... [w]e see these developments as problematic for a variety of reasons." *Access Charge Seventh Report and Order*, 16 FCC Rcd. at 9932 ¶ 23. According to the Commission, the IXCs' self-help refusal to pay access charges is simply "flouting their obligations under the tariff system." *Id.* In addition, the Board's decision to forgive self-help and also to demand refunds would rob the Iowa LECs of revenue that they lawfully are owed under their access tariffs. As these carriers argued to the Iowa Board, this substantial revenue loss, which for each LEC reaches over a million dollars, "threatens the very existence of" their businesses. Docket FCU 07-2, Motion to Stay Proceedings at 7 (Aug. 17, 2009). The Final Order thus imposes a significant risk that competition in Iowa will be materially diminished, a result that Section 253 was intended to forestall.

The Board's depriving the Iowa LECs of millions of dollars of access revenue also threatens Congress's and the Commission's goal of achieving widespread deployment of broadband facilities. To express its mandate for broadband availability, Congress devoted

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[38] Northern Valley/Sancom Comments at 17-20 (citing and quoting *Bell Atlantic-Delaware, et al. v. Frontier Communications, et al.*, Memorandum Opinion and Order, 15 FCC Rcd. 7475 (2000); *MGC Communications, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 15 FCC Rcd. 308, 312 ¶ 13 (1999); *Business WATS, Inc. v. American Tel. & Tel. Co.*, 7 FCC Rcd. 7942 ¶ 2 (1992)).

Section 706 of the 1996 Act to requiring that the FCC report regularly on the "availability of advanced telecommunications to all Americans" and to "encourage the deployment ... of advanced telecommunications capability." 47 U.S.C. § 157 nt. The Commission's efforts to implement this mandate are at this point legion, having initiated several proceedings devoted to broadband deployment[39] and reiterating on a daily basis how crucial is the goal of increasing broadband access.[40] Broadband now is recognized as not only a key element of the nation's economic future[41] but also as a means of ensuring homeland security and public safety.[42]

The Final Order "stands as an obstacle" to this federal goal as well. *Louisiana PSC*, 476 U.S. at 369. It forgives the IXCs for failing to pay, in bad faith, tariffed terminating access and demands refunds of any payments actually made. This revenue, according to the record before the Board, was money "that [the LECs] intended to use for purchasing and deployment high-capacity transmission facilities in Iowa."[43] By confiscating this revenue, the Board has materially impeded broadband deployment in Iowa and thus contravened Congress's mandate in Section 706. As such, the Final Order is "an obstacle" to valid federal goals.

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[39] *E.g.*, GN Docket No. 09-137, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, Notice of Inquiry, FCC 09-65 (rel. Aug. 7, 2009); GN Docket Nos. 09-47, *et al.*, *Contribution of Federal, State, Tribal, and Local Government to Broadband*, DA 09-2122 (Sept. 25, 2009).

[40] *E.g.*, FCC "Blogband," *available at* <http://blog.broadband.gov/>; FCC, Strategic Plan 2009-2014, *available at* <http://www.fcc.gov/omd/strategicplan/>.

[41] "Access to broadband continues to play a critical role in the economy of the United States and in American life." *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, Report, 23 FCC Rcd. 9615, 9652 ¶ 76 (2008).

[42] "Further, improved broadband services could enhance the public's ability to call for help in emergencies and public safety's ability to provide warnings, alerts, and emergency information to Americans in times of emergency or need." GN Docket Nos. 09-47, *Public Safety, Homeland Security, and Cybersecurity Elements of National Broadband*, DA 09-2133 (Sept. 28, 2009).

[43] Northern Valley/Sancom Comments at 14 (citing Docket FCU 07-2, Testimony of Ronald Laudner, Farmers Telephone Company of Riceville, Iowa at 17:8-12 (Sept. 15, 2008) ("we used it for the build-out of broadband and fiber networks into not only our rural serving areas, but the underserved rural areas of Qwest and Iowa Telecom"); Testimony of Rex McGuire, The Farmers & Merchants Mutual Telephone Company of Wayland, Iowa at 13:11-17 (Sept. 15, 2008) (access revenue is being used to deploy "CATV facilities with a fiber optic cable to the home network" which will enable company "to provide broadband Internet access, digital cable TV and innovative new services")).

Louisiana PSC, 476 U.S. at 368-69. Petitioners respectfully request that the Commission preempt the Final Order on this ground as well.

CONCLUSION

For the reasons stated herein, the Commission should declare that all matters regarding interstate access services, including rates, tariffs, and revenues, are within the Commission's exclusive jurisdiction and may not be addressed by state agencies. In addition, the Commission should preempt the Final Order as to each of the findings, conclusions, and ordering clauses discussed herein, and should issue a declaratory ruling that State Commissions may not attempt to regulate or enforce those matters.

October 6, 2009

Respectfully submitted,

By: 

Ross A. Buntrock
Stephanie A. Joyce
Michael W. Fleming
Arent Fox LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 775-5734 telephone
(202) 857-6395 facsimile

Counsel to
Great Lakes Communication Corp. and
Superior Telephone Cooperative

CERTIFICATE OF SERVICE

I, Edilma Carr, do hereby certify that I caused the foregoing **REPLY COMMENTS IN SUPPORT OF PETITION FOR DECLARATORY RULING TO THE IOWA UTILITIES BOARD AND CONTIGENT PETITION FOR PREEMPTION** to be served on the following persons via ECFS, First Class Mail *, or electronic mail **:

Craig J. Brown *
Robert B. McKenna
Qwest Communications Company, LLC
607 14th Street, N.W., Suite 950
Washington, D.C. 20005

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Chairman Julius Genachowski **
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Michael J. Copps **
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Robert M. McDowell **
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Meredith Attwell Baker **
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Mignon Clyburn **
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Sharon Gillett **
Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

John Branscome **
Deputy Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Catherine Seidel **
Deputy Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jennifer Schneider **
Legal Advisor to Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Christine Kurth **
Legal Advisor to Commissioner Robert M. McDowell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Carol Simpson **
Acting Legal Advisor to Commissioner Mignon Clyburn
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Christi Shewman **
Legal Advisor to Commissioner Meredith Attwell Baker
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Priya Aiyar **
Legal Advisor to Chairman Julius Genachowski
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Lynne Hewett Engledow **
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Doug Slotten **
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Best Copy **
fcc@bcpiweb.com
Portals II
445 12th Street, SW
Room 5-A361
Washington, D.C. 20554

Edilma Carr

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